# United States Court of Appeals for the Second Circuit



# BRIEF FOR APPELLEE

# 76-609

To be argued by RICHARD P. CARO

## United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6096

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET AL.,

Defendants.

AUG 6 1976

COUNCIL OF SUPERVISORS AND ADMINIS-TRATORS, LOCAL 1. AFSA, AFL-CIO, ET AL.,

Intervenors-Appellants,

COMMUNITY SCHOOL BOARD, DISTRICT 26,

Intervenors-Appellants.

UNITED STATES OF AMERICA,

Petitioner-Appelle

-against-

SOLOMON DEREWETSKY, ET AL.,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

### BRIEF FOR THE PLAINTIFF-APPELLEE

DAVID G. TRAGER, United States Attorney. Eastern District of New York.

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#### STATEMENT OF ISSUES

- Whether CSA's Appeal Should Be Dismissed For Lack of Standing?
- Whether the Intervenors Have Standing to Raise Fifth Amendment Claims On Behalf of Absent Parties?
- 3. Whether The Fifth Amendment Privilege Is Inapplicable Because The Requisite Degree of Probability of Prosecution Does Not Exist, The Data Is Not Incriminatory In Nature, And Is Otherwise Required To Be Produced?
- 4. Whether The Disclosure Of Aggregate Racial And Ethnic Data Is An Unconstitutional Invasion Of Privacy?
- 5. Whether The Government May Require Recipients To Complete Reports and Surveys?
- 6. Whether The Local Board Was Denied Due Process Or Otherwise Deprived Of Any Rights By The Requirement That the EEO-5 Form And The Special Compliance Report Be Completed?

#### STATEMENT OF THE CASE

#### PRELIMINARY STATEMENT

The Council of Supervisors and Administrators ("CSA") and the Community School Board, District 26 ("the local Board") have appealed from a final judgment and order of the District Court, upholding the Government's right to acquire racial, ethnic, and other data. The information is being sought for the purpose of ascertaining whether recipients of federal financial assistance are complying with the statutory prohibitions against discrimination.

Although CSA initially also appealed from a denial of a motion to vacate or modify an injunction, CSA in its brief has not dealt with this issue. Similarly, no brief on behalf of Howard L. Hurwitz respecting his appeal from the order and judgment holding him in civil contempt has been filed. 1/ Since these issues have not been pursued by appellants, they have not been addressed in this Brief.

#### A. The Proceedings Below Prior to Intervention:

On May 10, 1976, the United States of America commenced an action to compel the lawful authorities of the New York City public school system to distribute, complete, and return two

<sup>1/</sup> Mr. Hurwitz originally sought leave to file an interlocutory appeal, but his petition for leave to appeal was denied by the Court presumably since leave to appeal was no longer necessary because a final judgment and order had been entered.

information gathering instruments: the EEO-5 Form 2/ and the Special Compliance Report. 3/ The action was necessitated by the defendants' refusal and failure to timely distribute the instruments 4/ and the Government's need to acquire the data for the current school year while it was still available. 5/

Completion of the EEO-5 Form and the Special Compliance
Report is being required by OCR pursuant to 45 C.F.R. §§80.6 80.7 in accordance with its duty to conduct periodic, in-depth,
compliance examinations and to investigate complaints and data

<sup>2/</sup> The EEO-5 Form (Appendix at 69 "A 69") states on its face that it "is a joint requirement of the EEOC and the Office for Civil Rights ("OCR") of the Department of Health, Education and Welfare and the National Center for Education Statistics of the Department of Health, Education and Welfare."

<sup>3/</sup> The Special Compliance Report is an investigative instrument of the OCR that was developed for the current compliance examination of the New York City school system. See Paragraph 2 of the Affidavit of Martin H. Gerry ("Gerry Aff.") at Al3; the testimony of Carol Campbell at A82-97 and of Lucy Thomson at Al35-36.

<sup>4/ ¶¶4-9</sup> Gerry Aff. at Al4-19.

<sup>5/</sup> Much of the information sought is not preserved by the school system. (Testimony of Carol Campbell at Al07-108). Second, the data has to be correlated with all the other information obtained during the 1975-76 academic year and if this is not done, the entire year's acquisition of information would have to be recollected because of the need for consistency. (Testimony of Lucy Thomson at Al35-36; Al01-02.)

indicating possible violations of the statutory prohibitions barring discrimination. 6/

An in-depth compliance examination was initiated in July 1972 as the result of various complaints alleging unlawful discrimination, and the Special Compliance Report constitutes the final city-wide investigative instrument designed to ascertain whether specific violations of law exist. 7/ The information to be provided by this Report and by the EEO-5 Form was described in Paragraph 2 of the Gerry Affidavit (Alle 14) as follows:

"\* \* \* The Special Compliance Reports seek to obtain the following data: the race, sex, handicap, and non-English language dominance of individual school populations, of students enrolled in particular programs, and of students who have been subject to certain actions within a school; the types of programs offered by the school; the non-English language capabilities of staff in the school and in certain programs; information on expenditures; information on programs or activities which are disproportionately single-sex or adjusted

<sup>6/</sup> See ¶ 1, Gerry Aff. at Al2-13; Special Master's Report, Finding No. 3 at A205. A description of the possible violations of law is contained in the Affidavit of Martin H. Gerry, sworn to March 3, 1976, originally submitted in a prior action and introduced into evidence during the hearing before the Special Master as Government's Exhibit No. 14. (Al79-180.)

<sup>7/</sup> Special Master's Report, Finding No. 3 at A205; Testimony of Carol Campbell at A81-87 and that of Lucy Thomson at A133-136, 171-173, 176-177.

to maintain a specific male to female ratio; and other information about the school, e.g., how often its attendance boundaries have been changed in the last five years and the condition of its facilities. The EEO-5 forms seek to obtain information on the race and sex of staff, including full time and parttime staff and new hires."

A recipient of federal financial assistance is prohibited from discriminating against any person in any program or activity on the grounds of race, color or national origin under Title VI of the Civil Rights Act of 1964, 42 U.S.C. \$\$2000d et seq., on the grounds of sex under Title IX of the Education Amendments of 1972, 20 U.S.C. \$\$1681 et seq., and against the handicapped under Sectice 504 of the Rehabilitation Act of 1973, 29 U.S.C. \$794. 8/ The District Court, prior to intervention by appellants, determined that the Government was entitled to obtain the information in the EEO-5 Form and Special Compliance Report under these statutory provisions, that the data was relevant to OCR's investigation of possible violations of the statutory proh ions, and that the defendants were expressly required by regulation, 45 C.F.R. \$80.6 - 80.7,

<sup>8/</sup> As a condition to receipt of such assistance, each recipient is required to execute an Assurance of Compliance whereby it agrees not to discriminate and to comply with all regulations. It was uncontested that the alleged assurances of compliance (¶13 Complaint at A9-10) was executed for the New York City public school system. (Special Master's Report, Finding No. 2 at A205.)

and as a matter of contractual obligation under the Assurance of Compliance, to complete and return both surveys. (Special Master's Report, Conclusions of Law, at A207-208.) Accordingly, a permanent injunction (A214-217) requiring the completion and return of both the EEO-5 Form and the Special Compliance Report was issued by the District Court on May 27, 1976.

#### B. The Scope and Application Of the Permanent Injunction

The District Court's permanent injunction required in accordance with Rule 65(d), Fed. R. Civ. P., and the Assurance of Compliance, 9/ the defendants, "together with their successors in office and their agents, employees, subordinates, and all persons or entities in active concert or participation with them or subject to their supervision in this matter" to complete and answer fully the EEO-5 Form and the Special Compliance Report. The responsible education officials, on both the Central and local levels, determined what information would be acquired in advance, what information would be provided by

<sup>9/</sup> The Assurance of Compliance was executed on February 1, 1965 by the then President of the Central Board on behalf of the Central Board and all its successors, transferees, and assignees. (A9.)

supervisory, administrative personnel or by the faculty. 10/
Accordingly, a copy of the order was served by registered mail
to the local boards. Two copies were similarly sent to the
principal of every school required to complete the two
instruments, and one of these copies was required to be posted
to enable the faculty and other school officials to read the
order.

#### C. Intervention And Subsequent Relevant Proceedings

On June 16, 1976, the District Court entered an order permitting CSA to intervene in the action upon certain conditions, to wit that one or more of CSA's officers who were also principals individually be made party intervenors. (A236). This condition was imposed to overcome the Government's objection that CSA lacked standing to raise the rights of others and their lack of authorization under the General Associations Law §12 to litigate this type of case. Accordingly, the Court directed CSA to cure the defects of its intervention by intervening "by their officers, so and so as officers and

<sup>10/</sup> See ¶6 and Exs. 4 & 5 to the Gerry Aff. at Al5-16; Transcript of Hearing before Special Master at Al51. In this connection it should be noted that CSA inaccurately represented that the Government requires principals to execute the certification on the EEO-5 Form, (CSA's Brief at 13.) Neither the form itself, nor the accompanying instructions specifically require the principal to execute the certification. (See Appendix to CSA's Brief at 54 and 61.) If he does not execute the certification, his identity is not disclosed on the form.

individually." Notwithstanding the Government's repeated efforts to have CSA properly comply with this direction, CSA never properly intervened. CSA merely amended the caption to indicate it had intervened "by its officers." 11/

Although the local Board was allowed to intervene by the District Court's order of July 15, 1976 (A390), the local Board's representation that the intervenors were not afforded an opportunity to be heard in the lower court 12/ is inaccurate and misleading. Subsequent to the order of June 16, 1976, allowing CSA to intervene, a pre-hearing conference was held before the U. S. Magistrate to whom the District Court had referred the matter. Counsel for local Board 26 was present, participated in the meeting and subsequently submitted papers on behalf of the prospective intervenor.

At this meeting the U. S. Magistrate stated that if the papers of any party or prospective party raised factual issues requiring an evidentiary hearing, such a hearing would be held. The objections raised by the intervenors to the validity of the Court's prior judgment and order were subsequently determined

<sup>11/</sup> The Government had also objected to CSA's attempt to intervene in a representative capacity. (A236-37). The Court accordingly limited the intervention to those individual principals who would personally appear in the action. (A237) None did.

<sup>12/</sup> See the local Board's Brief at 2 and 3. Cf. CSA's Brief at 5.

as matters of law. Thus no additional testimony or other evidence was taken in connection with the intervenor's application to vacate or modify the permanent injunction order.

Finally, it should be noted the local community school boards and their individual board members are not requested or required themselves to directly provide any data.

#### ARGUMENT

I

## CSA's Appeal Should Be Dismissed For Lack Of Standing

In failing to comply with the direction of the District

Court that individual principals be joined as party intervenors

(A236), CSA failed to cure the very defects which prevent it

from having standing to intervene. These defects are twofold.

First, as an unincorporated association it is authorized by

section 12 of the General Associations Law of the State of New

York (McKinney's 1942) to maintain an action only "by the

president or treasurer \* \* \* to recover any property, or upon

any cause of action, for or upon which all the associates may

maintain such an action \* \* \* by reason of their interest jointly

or in common. \* \* \* " Since CSA's members, as members per se,

rather than as principals or other types of school officials,

are not affected by the permanent injunction, they do not have

the requisite interest, either jointly or in common.

Second, generally a person may assert only his own legal rights and interests and not those of another. E.g., Tileston v. Ullman, 318 U.S. 44 (1943). See, United States v. Raines, 362 U.S. 17 (1960); Warth v. Seldin, 422 U.S. 490, 499-501, 508-10 (1975). This general principal derives from the constitutional limitation on the power of the judiciary in Article III and as a rule of judicial restraint. The reasons for this

restriction are clear. Where a person asserts the rights of another there may not necessarily be a genuine case or controversy. The party whose rights are being asserted may not want or be interested in pursuing his rights, thus any decision rendered by a court would be advisory. The party asserting that other person's rights may not necessarily be acting consistent with the other's interests and indeed there may very well be a conflict of interest between the two. Thus there is a danger of inadequate representation and even collusion or fraud. For these and other reasons the Supreme Court has recognized only a few exceptions to the general rule, none of which are applicable to the present case. See generally, Sedler, Standing To Assert Constitutional Jus Tertii In the Supreme Court, 71 Yale L.J. 599 (1962), cited with approval in Warth v. Seldin, supra, 422 U.S. at 510, n. 20.

For these same reasons, the rule should be applied here.

First, CSA may be taking a position that is adverse or contrary to the interests of many or some of its members, e.g., those who are members of a minority group. Second, ample opportunity existed for any member required to provide data to

represent his or her own interests, 13/ and, third, he or she could do so without any impairment to protected constitutional rights resulting from the member's representation of himself or herself. Under these circumstances there is no reason to make an exception to allow CSA to litigate the rights of others.

For these reasons CSA's appeal from the final order of the District Court should be dismissed for failure to intervene as the lower court required and because it lacks standing to raise the rights of absent parties.

<sup>13/</sup> Indeed CSA stated in its "Hot Line" message of June 9, 1976, that it would provide the necessary legal assistance for any member who chose to defy or challenge the injunction order:

<sup>&</sup>quot; \* \* \* CSA maintains its policy not to answer questions concerning ethnic and racial data. CSA advises that full legal protection will be provided for any supervisor acting in accordance with the CSA position which is based on the individual supervisor's conscience and constitutional rights. CSA advises its members to submit incomplete forms to the District Chairman as directed. These forms will be incomplete since we will not answer questions re: ethnic data. The District Chairman will then submit these incomplete forms with a covering letter from CSA to the appropriate superintendent."

<sup>¶9</sup> of the Verified Complaint in <u>United</u>
States of <u>America v. Council of Super-visors</u> and <u>Administrators</u>, contained in record on appeal.

The Court Should Decline To Reach
The Issue Of Whether Any Individual's
Fifth Amendment Privilege Is Violated
Because The Intervenors Lack Standing
And the Matter Is Not Justiciable
At This Time

The Court should decline to decide the question of whether any individual's Fifth Amendment privilege against self-incrimination is being violated because the intervenors 14/lack standing to raise the rights of others, and because the issue is not justiciable at this time.

The intervenors lack standing to raise this issue on behalf of those individuals, principals, teachers and others upon whom the responsibility of providing the information has been placed. As previously stated in Argument I, supra, there is no impediment to these absent parties representing their own interests that would make one of the narrow exceptions to the general rule applicable.

In addition, even if intervenors had standing, the issue is not justiciable at this time because it was not properly raised below. 15/ Although the intervenors did not raise this

<sup>14/</sup> The local Board in its Brief erroneously assumes that local boards are providing information. This, however, is not the case, and, even if it were, the Fifth Amendment privilege is applicable only to natural persons. See, e.g., United States v. White, 322 U.S. 694, 699 (1944).

<sup>15/</sup> The local Board asserted the privilege only with respect to itself. See note 14, supra. CSA did not raise the issue at all.

issue initially, the United States Magistrate, on his own, did raise and reach the issue. Upon the Government's exception the District Court declined to adopt that portion of the Magistrate's Report and recommendations on the grounds that the determination of the issue would have to await assertion of the privilege by a particular person. The Government contends that the District Judge properly declined to decide the issue.

The Supreme Court in Stearns v. Woods, 236 U.S. 75, 78

(1915), noted that "[T]he province of courts is to decide real controversies, not to discuss abstract propositions."

This principle has been deemed to require courts to limit themselves to the adjudication of the contested issues raised by the parties in a concrete factual context. See, e.g.,

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 242 (1937).

In Socialist Labor Party v. Gilligan, 406 U.S. 583, 585 (1972), the Supreme Court upheld the decision of the lower court which had declined to rule on the merits of a claim respecting the constitutionality of an Ohio election statute requiring a loyalty oath which had not been effectively raised or litigated below. The Court stated its reasons as follows:

"\*\*\*[E]ven when jurisdiction exists it should not be exercised unless the case 'tenders the underlying constitutional issues in clean-cut and concrete form....' Problems of prematurity and abstractness may well present 'insuperable obstacles' to the exercise of the court's jurisdiction even though that jurisdiction is technically present...

"We find that the present posture of this case raises just such an obstacle. All issues raised below have become moot except for one that received scant attention in appellant's complaint and was treated not at all in the affidavits filed in support of the cross motions for summary judgment. Nothing in the record shows that appellants have suffered any injury thus far, and the law's future effect remains wholly speculative." Socialist Labor Party v. Gilligan, supra, 406 U.S. at 588-89 (1972), quoting in part, Rescue Army v. Municipal Court, 331 U.S. 549, 574, 584 (1947).

The problem of speculativeness, abstractness, and prematurity exist here. Since the persons whose constitutional rights are claimed to be violated never appeared to assert their rights, the facts necessary to determine whether the privilege would be applicable were never presented or developed. As this Court stated in <u>Terkildsen</u> v. <u>Waters</u>, 481 F.2d 201, 204-05 (2d Cir. 1973):

"\*\*\* Adherence to the rule [of practice which forecloses appellate consideration of issues not raised below] is particularly apt where, as here, factual questions may have been implicated as to which the judge made no findings because the issue was not directly raised and equally, where considerations underlying a subtle legal issue could have been exposed and distilled by the able district judge so as to facilitate more informed consideration by this court.

See also, Schwartz v. S. S. Nassau, 345 F.2d 465, 466 (2d Cir.), cert. denied, 382 U.S. 919 (1965).

For the above reasons the Court should decline to decide the issues respecting the Fifth Amendment privilege on the grounds that the intervenors lack standing and the issue is not justiciable at this time.

#### III

Alternatively The Fifth Amendment Privilege Is Not Applicable Because The Requisite Degree of Probability Of Prosecution Does Not Exist, The Data Sought Is Not Incriminatory In Nature, And Is Otherwise Required To Be Produced

The criteria for determining when a person otherwise required to disclose information may, nevertheless, assert the constitutional privilege against self-incrimination were set forth in California v. Byers, 402 U.S. 424 (1970). Upon its analysis of prior precedent, the Court there held that this personal privilege was not applicable unless there was a "substantial" possibility of criminal prosecution (402 U.S. at 428-30) and that, even if this likelihood of prosecution existed, the privilege did not protect from compulsory disclosure essentially neutral facts required for legitimate Government purposes (402 U.S. at 432-34).

The meaning of a "substantial possibility of criminal prosecution" was explained by the Court in <u>Byers</u> to constitute "\*\*\*disclosures\*\*\* extracted from a 'highly selective group inherently suspect of criminal activities' \*\*\*in 'an area permeated with criminal statutes' -- not in 'an essentially noncriminal and regulatory area of inquiry.'" (402 U.S. at 430).

Here information is not being extracted "from a 'highly selective group inherently suspect of criminal activities.'"

Principals, teachers and other school officials are not inherently criminally suspect categories of people. See,

Heligman v. United States, 407 F.2d 448, 451 (8th Cir. 1969),

cert. denied, 395 U.S. 977 (1969) (holding that corporate officers are not an inherently criminally suspect group).

Secondly, the investigation here is "in 'an essentially noncriminal and regulatory area of inquiry." The inquiry concerns whether a recipient of federal financial assistance has violated the terms and conditions to its receipt of such assistance. In Albertson v. SACB, 382 U.S. 70 (1965), Marchetti v. United States, 390 U.S. 39 (1968), Gosso v. United States, 390 U.S. 62 (1968), and Hayes v. United States, 390 U.S. 85 (1968), the privilege was asserted to bar compulsion to disclose information to federal authorities respecting crucial elements of federal crimes. In each case the information being compelled constituted itself a virtual admission of illegal activities and subjected the discloser of the information to almost certain and imminent prosecution. This is clearly not the case here.

In the circumstances of the present case, the requisite degree of immediacy and probability of criminal prosecution is plainly not present. Cf. Zicarelli v. New Jersey St. Com'n of Investigation, 406 U.S. 472, 478-479 (1972). If anything

it is remote and the remoteness of the likelihood of prosecution is further increased by the fact that the identity of the person providing the information is not disclosed except in the instance of the person who executes a certification. But even in this case, the certification may be executed by someone who was not a party to any allegedly discriminatory acts or activities.

Thus the Government contends that there does not exist a sufficient threat of criminal prosecution that would warrant an individual who is required to observe and report his observations from refusing to do so under the privilege against self-incrimination.

However, even assuming that there is a substantial possibility of criminal prosecution, the privilege against self-incrimination does not relieve a person of the obligation to disclose essentially neutral, non-incriminatory facts.

The Court in <u>Byers</u> noted that irrespective of collateral consequences, "[d]isclosure of name and address is an essentially neutral act," 402 U.S. at 432, and further that "[a] name linked with a motor vehicle is no more incriminating than the tax return, linked with the disclosure of income\*\*\*. It identifies but does not itself implicate anyone in criminal conduct." (Citation omitted) 402 U.S. at 433-34. Under this principle it has been held also that disclosure of the physical characteristics of a person, such as height and weight, may

be compelled, United States v. Leyba, 504 F.2d 441, 443 (10th Cir. 1974), cert. denied, 420 U.S. 934 (1975), and that a person may be required to disclose the identity of others, including their names and social security numbers. United States v. Turner, 480 F.2d 272, 277-78 (7th Cir. 1973).

Similarly, no Fifth Amendment privilege operates to relieve a person of his obligation to disclose information required a various regulatory statutes, such as the securities laws, drug laws, alcohol and firearm laws. See e.g., United States v. Resnick, 488 F.2d 1165, 1168 (5th Cir. 1974).

The information sought here by the Government is similarly of a neutral, non-incriminating nature, required by law to be disclosed in connection with the Government's right to assure that the deprivation of the civil rights of any person by a recipient of federal financial assistance is not occurring.

Only aggregate data concerning primarily race, ethnicity, sex, language abilities, or other disabilities is being required to be disclosed. The identity of individuals is not being sought. The disclosure of the data required is similar to that provided in the past to federal, state and local authorities. Clearly this type of information is as neutral in nature as a person's name, address, height, weight, or social security number, and certainly less "incriminating" than the disclosure of an identified person's income and the various regulated transactions and activities engaged in by the person identified. It is also

significant that the intervenors have not raised any legal objection to disclosing aggregate data concerning the sex 16/ of either students or staff. Clearly aggregate ethnic and racial data on students and staff is no more incriminatory in nature than data on the number of males and females in a particular class, school or district. If disclosure of the latter type of information can be compelled notwithstanding an assertion of the Fifth Amendment privilege so too should the former data be found neutral and required to be disclosed.

Finally, the data that the Government seeks is required to be disclosed by the legal entity known as the New York City School District. This entity can only act through its human instruments, who have been duly directed by their superiors to obtain the data. These human instruments, be they principals or teachers or other school officials, are required to look up records and files, and in some instances to ascertain someone's ethnicity or race or sex or language disability by observation or from the general knowledge that they had obtained as employees of the school system. After the information is gathered, someone must aggregate it and fill out the requisite Form or Report.

<sup>16/</sup> Since the names of people are neutral facts and since a person's sex can generally be determined from his or her first name, then it can not be concluded that the Fifth Amendment privilege ordinarily protects from compulsory disclosure the fact that a person is male or female.

The Fifth Amendment privilege of these individuals is simply not violated by requiring them to observe and report in their official capacities since the privilege is limited to natural persons and thus cannot be raised by the recipient as grounds for refusing to submit reports and other filings required by law. For example, in Heligman v. United States, supra, the president of a corporation refused to fill out and file the corporation's income tax form on the grounds that to compel him to fill out the form would require him to disclose information which might incriminate him with respect to pending and potential criminal charges. The Court of Appeals rejected this contention and held as follows (407 F.2d at 451-52):

"The defendant, as a corporation president, has a statutory obligation to either file or cause to be filed a proper corporate tax re-The affirmative requirements of §7203 the directed to all taxpayers, corporate and individual, who are subject to filing a return under the tax laws. It is neutral in its application and is not directed against a group 'inherently suspect of criminal activities.' Corporation presidents and the other corporate officers mentioned in §6062 are not an inherently suspect group.

"Furthermore, the defendant was not privileged to refuse the production of corporate records nor could he withhold any incriminatory corporate records. These are not personal records and the government has a right to view corporate records for legitimate investigative purposes. Wilson v. United States, 221 U.S. 361, 31 S.Ct. 538, 55 L. Ed. 771 (1911) long ago held that the president of a corporation could not refuse to produce corporate records on the ground that they would incriminate him, stating at 384, 31 S.Ct. at 546. 'If the corporation were guilty of misconduct, he could not withhold its books to save it; and if he were implicated in the violations of law, he could not withhold the books to protect himself from the effect of their disclosures.'

Later the Supreme Court of the United States in United States v. White, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944) held an officer of a labor union could not refuse to produce union records under a Fifth Amendment claim against self-incrimination, the Court reasoning at 699, 64 S.Ct. at 1251. "But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination.'

"There is another aspect of defendant's claim which should be mentioned. While we are of the opinion that the Fifth Amendment claim against self-incrimination is not available to the defendant under the facts of this case, it is difficult for us to perceive how the defendant can seriously advance his claim when he could easily have had some other corporate officer sign the return and file it so that actually he was not confronted by any substantial and real hazard of compelled incrimination. \*\*\*"

The information sought is not "personal", within the meaning of the Constitutional privilege, with respect to individuals being required to provide the information in their official capacity for and on behalf of the school system as the statement from <u>United States v. White</u>, quoted above, makes clear. The person providing the information for the school system thus cannot relieve the school system of its obligation to provide the data by raising personal rights which are unavailable to the school system.

Additionally, even if the information required to be disclosed could be obtained solely from an individual's "personal" knowledge, and not from existing records, the person can be compelled to disclose the information notwithstanding

the privilege, otherwise enforcement of the laws would become impossible and a sham. Compliance with tax laws could be easily avoided by failing to maintain records. Cf. Stoltzfus v. United States, 264 F. Supp. 824, 828 (E.D. Pa. 1967), aff'd, 398 F.2d 1002 (3d Cir. 1968), cert. denied, 393 U.S. 1020 (1969). Similarly, required disclosure of regulated transactions, cf. United States v. Various Gambling Devices, 368 F. Supp. 661, 664-68 (N.D. Miss. 1973), or the identity of business associates, cf. United States v. Turner, supra, 480 F.2d at 276-78, could be easily avoided by the contention that the information is obtainable only from the memory of the person asserting the privilege. Here to require individuals in their capacity as the instruments, agents and employees of the New York City public school system, in their role as public officials, to gather information by observation and then record it is no more constitutionally privileged than requiring that same person to look up information in records and files and then record it. 17/ As Mr. Justice Holmes stated

<sup>17/</sup> As the Government's Memorandum before the Magistrate indicated there is also a substantial question concerning whether school officials waived any right not to disclose this information when they accepted and continued in the employ of the school system notwithstanding the fact that the law required the disclosure of such data. Indeed similar data has been provided in the past to federal, state and local authorities. (Compare N.Y.S. BEDS, EEO-5 forms and OCR's 102 forms for prior years.) In addition as direct or indirect beneficiaries of federal financial assistance they should be deemed to have agreed to provide the requisite information.

in <u>United States</u> v. <u>Sullivan</u>, 274 U.S. 259, 263 (1927), with respect to a person claiming that the privilege rendered him immune from having to fill out as well as file an income tax return, "[The defendant] could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law."

The Court should thus hold that the Fifth Amendment privilege is not applicable here because the requisite degree of probability of criminal prosecution is not present, the information is neutral and not incriminatory, and finally is otherwise required to be produced as a matter of course as a condition to receipt of federal financial assistance.

The Disclosure Of Aggregate Racial And Ethnic Data Is Not an Unconstitutional Invasion Of Privacy

The Supreme Court and the Courts of Appeals have repeatedly upheld a federal agency's broad investigatory authority to obtain information in connection with an investigation of a matter within the agency's competence. See generally,

United States v. Morton Salt Co., 338 U.S. 632 (1950);

Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946);

Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943). The only limitations are that the demand be not unreasonable and that the information sought be not privileged from disclosure.

In this case it can not be gainsaid that the investigation is authorized, being conducted for a lawful purpose and that the data sought is relevant.

What is asserted by CSA is that this information is protected from disclosure by the right of privacy of absent third parties. Again the Government contends that CSA lacks standing to raise this issue. Alternatively, the Government contends that there is no unconstitutional violation of the right of privacy.

CSA's contention is premised on an erroneous assumption, to wit that, since a person's ethnic and racial identity is a personal or private fact, it is constitutionally protected from disclosure. If this premise were a proper principle of law,

the Government's ability to conduct lawful investigations and the rights of litigants to discovery would be rendered virtually a nullity since such disclosure is usually directed towards ascertaining information which is not public but which is personal and private. Indeed disclosure of the ethnicity and race and linguistic abilities of unidentified teachers and students can hardly be characterized as an invasion of privacy. On the contrary such information is by its very nature less personal or private than an individual's name, home address, familial status, occupation, etc., which have always been recognized as being subject to disclosure, and which the intervenors do not contend should not be disclosed. The only persons who are identified by name, ethnicity and race are those principals who voluntarily choose to execute the required certifications. 18/ Providing the ethnicity and race of classes of people (students, teachers, supervisory personnel) is required on an aggregated basis without the disclosure of identity of the persons being classified simply does not constitute an unconstitutional invasion of privacy.

<sup>18/</sup> No principal is required to execute a certification.

See footnote 10, supra, at 6. Another person whose ethnicity and race is either not disclosed or not separately identified may execute the certification, thereby preserving the anonimity of all those whose ethnicity and race is disclosed. Furthermore in those instances in which a principal executes the certification, the identity of the principal will not be correlated with the principal's ethnic or racial information.

CSA also ignores the fact that the disclosure of information is being sought from persons not as private citizens, but rather in their capacities as the employees, agents, or servants of New York City public school system and the Central Board of Education. The Education Law of N.Y.S., Art. 52-A §2590-g subdiv. 5 (McKinney's 1970). The Central Board of Education has lawfully directed the principals to provide the information and has recognized or acceded to the Government's right to obtain this information. It is not the personal right of the principals to assert whatever right, if any, to nondisclosure that may belong to the legal entity known as the New York City School District and its governing body, the Central Board of Education. The data sought from school records and other sources of information, including teachers, is not the personal property of the principals but part of the public school system's public records and files. Cf., Wilson v. United States, 221 U.S. 361, 379-80 (1911); accord, Davis v. United States, 328 U.S. 582, 589-90 (1946).

Assuming, however, that a principal may raise his or her personal right of privacy, for an infringement of this protection to be unconstitutional, a two-prong test must be satisfied: first, that disclosure of ethnic and racial information infringes upon one or more of constitutionally protected zones of interests and second, that the infringement is

without sufficient justification. Griswold v. State of

Connecticut, 381 U.S. 479, 484-86 (1965); Roe v. Wade, 410

U.S. 113, 155-56 (1973). Neither requirement is here satisified.

Disclosure of ethnic and racial data has not been shown to infringe any constitutionally protected zone of privacy, as, for example, the sanctity of one's home. Nor has CSA taken issue with the determination (A381-82) that the disclosure of this information will not have any chilling effect on any First Amendment rights. What is contended is that by requiring disclosure under threat of contempt, the right to freedom of speech is impaired. In so contending intervenors have ignored the fact that it is commonplace to require a person to disclose information under threat of lawfully imposed sanctions. See, e.g., Rule 39, Fed.R.Civ.P. Generally it has not been considered to be a violation of the First Amendment to so require disclosure under penalty of lawful sanction. See, e.g., Bransburg v.

Hayes, 408 U.S. 665, 667, 682, 699-700 (1972).

Intervenors also attempt to establish a violation of privacy on the grounds that the confidentiality of the information obtained concerning identified individuals will not be protected by OCR. To the extent that the intervenors have statutory rights to the preservation of the confidentiality of the information, see, e.g., the Privacy Act of 1974, 5 U.S.C. §552a. the appropriate remedy for an unlawful disclosure is other than relief from their legal obligation to provide the

information. See, National Ornament and Electric Light
Christmas Ass'n., Inc. v. C.P.S.C., 526 F.2d 1368, 1372

(2d Cir. 1975). To the extent disclosure is lawful, the
intervenors have no remedy, or right to prevent disclosure.

See, F.T.C. v. Cinderella Career and Finishing Schools, Inc.,
404 F.2d 1308, 1313-1316 (D. C. Cir. 1968).

Even if it were assumed that the right to privacy provided protection against disclosure of ethnic and racial data the intervenors have not established that the disclosure here is unjustified. The right of privacy is not absolute and must yield to overriding public interests.

"\*\*\*[T]he infringement of protected First Amendment rights must be no broader than necessary to achieve a permissible governmental purpose\*\*\*." Branzburg v. Hayes, supra, 408 U.S. at 699.

The Supreme Court recently gave witness again to this principle in Runyon v. McCrary, U.S. \_ , 96 S.Ct. 2586, 2597 (1976):

"3. The Right of Privacy
"The Court has held that in some situations the Constitution confers a right of privacy. See Roe v. Wade, 410 U.S. 113, 152-153;
Eisenstadt v. Baird, 405 U.S. 438, 453; Stanley v. Georgia, 394 U.S. 557, 564-565; Griswold v. Connecticut, 381 U.S. 479, 484-485. See also Loving v. Virginia, 388 U.S. 1, 12; Skinner v. Oklahoma, 316 U.S. 535, 541.

"While the application of § 1981 to the conduct at issue here--a private school's adherence to a racially discriminatory admissions policy--does not represent governmental intrusion into the privacy of the home or a similarly intimate setting, it does implicate parental interests. These interests are related to the procreative rights protected in Roe v. Wade, supra, and Griswold v. Connecticut, supra. A person's decision whether to bear a child and a parent's decision concerning the manner in which his child is to be educated may fairly be characterized as exercises of familial rights and responsibilities. But it does not follow that because government is largely or even entirely precluded from regulating the childbearing decision, it is similarly restricted by the Constitution from regulating the implementation of parental decisions concerning a child's education.

"The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation. See Wisconsin v. Yoder, 406 U.S., at 213; Pierce v. Society of Sisters, 268 U.S., at 534; Meyer v. Nebraska, 262 U.S., at 402. Indeed, the Court in Pierce expressly acknowledged 'the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils....'

268 U.S., at 534. See also Prince v. Massachusetts, 321 U.S. 158, 166. "Section 1981, as applied to the conduct at issue here, constitutes an exercise of federal legislative power under § 2 of the Thirteenth Amendment fully consistent with Meyer, Pierce, and the cases that followed in their wake. As the Court held in Jones v. Alfred H. Mayer Co., supra, [i]t has never been doubted ... "that the power vested in Congress to enforce [the Thirteenth Amendment] by appropriate legislation"...includes the power to enact laws "direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not"' 392 U.S., at 438 (citation omitted). The prohibition of racial discrimination that interferes with the making and enforcement of contracts for private educational services furthers goals closely analogous to those served by § 1981's elimination of racial discrimination in the making of private employment contracts and, more generally, by § 1982's guarantee that 'a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man.' Jones v. Alfred H. Mayer Co., 392 U.S., at 443." (Footnotes omitted.)

The civil rights statutes being enforced by OCR are also acts of Congress to protect and foster constitutional rights by appropriate legislation in the area of education in which the Government has a legitimate interest to impose reasonable regulations. Pursuant to statutory authorization the racial and ethnic date is being acquired by OCR to protect the

constitutional and civil rights of persons involved in the educational process of New York City's public schools.

These laws protect such fundamental interests as equality in being able to enter contracts, equality in employment, and equality in education. The acquisition of ethnic and racial data for the protection of such fundamental interests is not only a legitimate governmental interest but one that clearly overrides intervenors' First Amendment objections.

In contrast the cases cited by the intervenors in which the Supreme Court disapproved of the disclosure of racial data under the Fourteenth Amendment, the Court found that the information was ultimately being used for an illegimate purpose by state officials in a conscious and systematic effort to deprive black citizens of their constitutional rights. See, e.g., Whiters v. Georgia, 385 U.S. 545 (1967); Tancil v. Wood, 379 U.S. 19 (1964), aff'g, Ham v. Virginia St. Bd. of Elections, 230 F.Supp. 156 (E.D. Va. 1964); Anderson v. Martin, 375 U.S. 399 (1964). Similarly in those cases where an unconstitutional invasion of privacy was found to exist, there was also absense of a legitimate state interest which justified the intrusion of privacy. See; e.g., Shelton v. Tucker, 364 U.S. 479 (1960); Watkins v. United States, 354 U.S. 178 (1957).

The public interest in the effective enforcing of the civil rights laws in educational systems clearly overrides any objection on the grounds of privacy to the Government's acquisition of essential information. The intervenors have implicitly recognized that the Supreme Court in Keyes v. School Dis. No. 1, 413 U.S. 189, 196 (1972), approved the acquisition and utilization of ethnic and racial data and have quoted the Court as follows (Brief at 40):

"'In addition to the racial and ethnic composition of a school's student body, other factors, such as the racial and ethnic composition of faculty and staff and the community and administration attitudes toward the school, must be taken into consideration' [scoring added] \* \* \*."

See also <u>Washington</u> v. <u>Davis</u>, 96 S.Ct. 2040, 2050-51 (1976), in which the Supreme Court recognized the need for utilization of methods for determining if employment tests are discriminatory. All such tests depend upon the availability and use of ethnic and racial data.

For these reasons it is clear that the intervenors have not established that any unconstitutional invasion of privacy has here occurred.

The Government May Require Recipients To Complete Reports and Surveys

The local Board contends that the only requirement imposed upon the recipient is that access be given to representatives of OCR to the recipient's books, records and other sources of information and that the recipient is under no obligation to complete the Special Compliance Report or the EEO-5 Form.

Reliance is placed upon 45 C.F.R. §80.6(c). However, its reliance is misplaced. 45 C.F.R. §80.6(b) expressly requires a recipient to complete OCR's compliance reports:

"Compliance reports. Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part."

Similarly, under 29 C.F.R. §1602.41(a) completion of the EEO-5 Form by the recipient is required:

"On or before November 30, 1974, and annually thereafter, certain public elementary and secondary school systems and districts, including individually or separately administered districts within such systems, and individual schools within such systems or districts shall file with the Commission or its delegate executed copies of Elementary-Secondary Staff Information Report EEO-5 in conformity with the directions set forth in the form and accompanying instructions. \*\*\*"

In addition were the law construed to require OCR to examine every file in every school and observe every student, teacher and other persons within the statutory protections, throughout the country, the Government's ability to enforce the civil rights laws would be rendered a nullity. The only reasonable effect that 45 C.F.R. 80.6(c) can be said to have is to allow Government officials access to the records of a recipient when the Government determines that it is appropriate for the Government to acquire the information directly. Thus 45 C.F.R. §80.6(c) clearly does not relieve the recipient of its obligation to complete the Special Compliance Report or the EEO-5 Form.

The Local Board Was Not Denied Due Process Nor Otherwise Deprived Of Any Rights With Respect To The Requirement That The EEO-5 Form And The Special Compliance Report Be Completed

In Arguments IV, V, and VI in the Local Board's Brief
(at 10-15), it is contended in essence that because of decentralization, OCR was required to execute separate Assurances
of Compliance with each local Board, send each separate demands
for the data and separate notices of institution of legal action,
and to have named each as a party defendant in the original suit.

The 1965 Assurance of Compliance which was required by
45 C.F.R. §80.4 was executed on behalf of the entire New York
City public school system as a condition to its receipt of
federal financial assistance. The Assurance of Compliance
was expressly made "binding upon the applicant, its successors,
transferees and assignees \*\*\*."

The lower court accordingly held that the local boards were bound by the 1965 Assurance of Compliance (A379-80):

"Even if the 'Assurance of Compliance' signed by James B. Donovan on behalf of the Central School Board in 1965 was signed before the various Local Boards came into existence, it was made 'binding upon the applicant, its successors, transferees and assignees.' Should the Local Boards be entities distinct from the Central Board, they are nonetheless in regard to the functions and powers they individually possess, successors, transferees and assignees of the Central Board. \* \* \*"

Furthermore, most of the federal financial assistance provided the City schools, including the schools in District 26, was applied for and obtained by the Central Board for the benefit of and use in all the City's schools on condition that compliance data would be furnished as required. The local Board did not apply directly for this assistance but has relied entirely on the Central Board. Under these circumstances, the local Board, having relied on the Central Board and having had the benefit of this assistance is clearly bound to the obligations imposed as a condition to receipt of this assitance, as the District Court held (A380), see e.g., Blake Constr. Co. v. United States, 296 F.2d 393, 396 (D.C. Cir. 1961), and cannot now claim to be the direct and principal recipient with respect to such assistance. Accordingly, OCR is not required to send it and the other local boards separate demands for the information and individual notices of suit. 19/

<sup>19/</sup> It should be noted that at the time the Government initiated the action, the Government had no cause of action against any local board since they did not have copies of the documents to be completed. Furthermore, on April 1, 1976, OCR met with the local district superintendents to advise them of the Special Compliance Report. (Testimony of Carol Campbell A97-98.) The record does not indicate that any local board ever notified OCR of its refusal to complete the Report.

OCR's demand to the Central Board for the compliance information was thus binding upon the local boards as well.

In addition, the local Board, for these same reasons and in view of its uncontested legal relationship with the Central Board, was lawfully subject to the injunction even though it was not a party to the original proceedings as the District Court held (A380):

"\*\*\* Rule 65(d) of the Federal Rules of Civil Procedure provides that an injunction or restraining order is binding on

'Parties to the action, their officers, agents, servants, employees, and attorneys and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise'

Inasmuch as principal's and supervisor's salaries are the responsibility of the Central Board in its capacity of 'Public Employer' under the Education Law of New York State and in view of the fact that the Central Board by that law, formally appoints all supervisors, teachers; is responsible for paying the salary of all salaried employees and is empowered to require local Community Boards to render such reports as necessary. Education Law of New York State Art. 52 Section 2573 1(b), Art 52-A Section 2590-g Subdivisions 5, 6 and 7. The Local Boards, principals, teachers and other employees are subject to the authority of the Central Board and thereby bound by the Court's injunction order as contemplated in Rule 65 (d) of the Federal Rules of Civil Procedure."

Even if the local Board is not considered an agent or employee of the Central Board, the local Board falls within the class of those who necessarily must act "in concert or participation with" the Central Board, since necessary compliance data must be provided by the schools under the local Board's immediate control:

"\*\*\* [P]ersons not technically agents or employees may be specifically enjoined from knowingly aiding a defendant in performing a prohibited action if their relationship is that of associate or confederate." Chase Nat'l Bk. v. Norwalk, 291 U.S. 431, 436 (1934).

Furthermore, the relation of privity between the Central and local Board cannot be denied since the local Board receives most of its local and federal financial assistance from the Central Board. See generally, Wright & Miller, 11 Fed.

Prac. & Proc. §2956. Thus even though it was not a party to the proceedings which resulted in the issuance of the injunction, upon receipt of actual notice of the order, the local Board was required to comply with the injunction until it is set aside. See, e.g., Walker v. City of Birmingham, 388 U.S.

307, 318-19 (1967); Leighton v. Paramount Picture Corp., 340 F.2d 859, 861 (2d Cir.), cert. denied, 381 U.S. 925 (1965). Finally, its own intervention and attempt to vacate the injunction below moots any objection it may have had to its absence from the earlier proceedings.

For these reasons the local Board is bound by the Assurance of Compliance and by the injunction, and the injunction is not invalid merely because the local Board was not a party to the original proceedings or because OCR did not deal with it directly.

#### CONCLUSION

For the reasons stated herein the Court should uphold the Government's right to acquire the racial and ethnic data sought by the EEO-5 Form and the Special Compliance Report and should otherwise uphold the validity of the injunction that was entered herein on May 27, 1976, and accordingly affirm the final judgment and order of the District Court.

Dated: Brooklyn, New York August 6, 1976

Respectfully submitted,

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ADDENDUM

### § 1681. Prohibition against sex discrimination—Exceptions

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergradu-

ate higher education;

- (2) in regard to admissions to educational institutions, this section shall not apply (A) for one year from the date of enactment of this Act [June 23, 1972], nor for six years after such date in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;
- (3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;
- (4) this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;
- (5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex.

(6) This section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from

taxation under section 501(a) of the Internal Revenue Code of 1954 [26 USCS § 501(a)], the active membership of which consists primarily of students in attendance at an institution of higher education, or (B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age.

(b) Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this title [20 USCS §§ 1681–1686; 29 USCS §§ 203, 213; 42 USCS §§ 2000c, 2000c-6, 2000c-9, 2000h-2] of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) For purposes of this title an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

(June 23, 1972, P. L. 92-318, Title IX, § 901, 86 Stat. 373; Dec. 31, 1974,

P. L. 93-586, § 3(a), 88 Stat. 1862.)

### § 1682. Federal administrative enforcement

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 901 [20 USCS § 1681] with respect to such program or activity by issuing rules, . regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall

become effective until thirty days have elapsed after the filing of such report.
(June 23, 1972, P. L. 92-318, Title IX, § 902, 86 Stat. 374.)

# § 1683. Judicial review

Any department or agency action taken pursuant to section 1002 [Section 902] [20 USCS § 1682] shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 902 [20 USCS § 1682], any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5, United States Code [5 USCS §§ 701–706], and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title [5 USCS § 701]. (June 23, 1972, P. L. 92-318, Title IX, § 903, 86 Stat. 374.)

#### § 1684. Prohibition against discrimination against the blind

No person in the United States shall, on the ground of blindness or severly impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any education program or activity, but nothing herein shall be construed to require any such institution to provide any special services to such person because of his blindness or visual impairment.

(June 23, 1972, P. L. 92-318, Title IX, § 904, 86 Stat. 375.)

#### § 1685. Effect on other laws

Nothing in this title [20 USCS §§ 1681–1686; 29 USCS §§ 203, 213; 42 USCS §§ 2000c, 2000c-6, 2000c-9, 2000h-2] shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

(June 23, 1972, P. L. 92-318, Title IX, § 905, 86 Stat. 375.)

#### § 1686. Separate living facilities allowed

Notwithstanding anything to the contrary contained in this title [20 USCS §§ 1681-1686; 29 USCS §§ 203, 213; 42 USCS §§ 2000c, 2000c-6, 2000c-9, 2000h-2] nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

(June 23, 1972, P. L. 92-318, Title IX, § 907, 86 Stat. 375.)

29 U.S.C. § 794

# § 794. Nondiscrimination under Federal grants

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Pub.L. 93-112, Title V, § 504, Sept. 26, 1973, 87 Stat. 394.

42 U.S.C. §§ 2000d et seq.

#### NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

#### § 2000d. Nondiscrimination in federally assisted programs

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

(July 2, 1964, P. L. 88-352, Title VI, § 601, 78 Stat. 252.)

#### § 2000d-1. Effecting compliance with nondiscrimination provision

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 [42 USCS § 2000d] with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with

achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such

(July 2, 1964, P. L. 88-352, Title VI, § 602, 78 Stat. 252.)

### § 2000d-2. Judicial review

Any department or agency action taken pursuant to section 602 [42 USCS § 2000d-1], shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 602 [42 USCS § 2000d-1], any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with section 10 of the Administrative Procedure Act, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that section.

(July 2, 1964, P. L. 88-352, Title VI, § 603, 78 Stat. 253.)

#### § 2000d-3. Employment practices

Nothing contained in this title [42 USCS §§ 2000d-2000d-4] shall be construed to authorize action under this title [42 USCS §§ 2000d-2000d-4] by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

(July 2, 1964, P. L. 88-352, Title VI, § 604, 78 Stat. 253.)

# § 2000d-4. Programs financially assisted by insurance or guaranty contracts

Nothing in this title [42 USCS §§ 2000d-2000d-4] shall add to or derract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

(July 2, 1964, P. L. 88-352, Title VI, § 605, 78 Stat. 253.)

§ 2000d-5. Compliance of local agencies with Civil Rights Act of 1964

The Commissioner of Education shall not defer action or order action deferred on any application by a local educational agency for funds authorized to be appropriated by this Act, by the Elementary and Secondary Education Act of 1965, by the Act of September 30, 1950 (Public Law 874, Eighty-first Congress), by the Act of September 23, 1950 (Public Law 815, Eighty-first Congress), or by the Cooperative Research Act, on the basis of alleged noncompliance with the provisions of title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d-2000d-4] for more than sixty days after notice is given to such local agency of such deferral unless such local agency is given the opportunity for a hearing as provided in section 602 of title VI of the Civil Rights Act of 1964 [42 USCS § 2000d-1], such hearing to be held within sixty days of such notice, unless the time for such hearing is extended by mutual consent of such local agency and the Commissioner, and such deferral shall not continue for more than thirty days after the close of any such hearing unless there has been an express finding on the record of such hearing that such local educational agency has failed to comply with the provisions of title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d-2000d-4]: Provided, That, for the purpose of determining whether a local educational agency is in compliance with title VI of the Civil Rights Act of 1964 (Public Law 88-352) [42 USCS §§ 2000d-2000d-4], compliance by such agency with a final order or judgment of a Federal court for the desegregation of the school or school system operated by such agency shall be deemed to be compliance with such title VI [42 USCS §§ 2000d-2000d-4], insofar as the matters covered in the order or judgment are concerned.

(Nov. 3, 1966, P. L. 89-750, Title I, Part H, § 182, 80 Stat. 1209; Jan. 2,

1968, P. L. 90-247, Title I, Part A, § 112, 81 Stat. 787)

§ 2000d-6. Policy with respect to the application of certain provisions of Federal law

(a) Declaration. It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d-2000d-4] and section 182 of the Elementary and Secondary Education Amendments of 1966 [42 USCS § 2000d-5] dealing with conditions of segregation by race, whether de jure or de facto, in the schools of the local educational agencies of any State shall be applied uniformly in all regions of the United States whatever the origin or cause of such segregation.

(b) Uniformity. Such uniformity refers to one policy applied uniformly to de jure segregation wherever found and such other policy as may be provided pursuant to law applied uniformly to de facto segregation wherever found.

(c) Compliance. Nothing in this section shall be construed to diminish the obligation of responsible officials to enforce or comply with such guidelines and criteria in order to eliminate discrimination in federally-assisted programs and activities as required by title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d-2000d-4].

(d) Additional funds. It is the sense of the Congress that the Department of Justice and the Department of Health, Education, and Welfare should request such additional funds as may be necessary to apply the policy set forth in this section throughout the United States.

(Apr. 13, 1970, P. L. 91-230, § 2, 84 Stat. 121.)

RULE 65(d), FED. R. CIV. P.

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

# § 1602.41 Requirement for filing and preserving copy of report.

(a) On or before November 30, 1974, and annually thereafter, certain public elementary and secondary school systems and districts, including individually or separately administered districts within such systems, and individual schools within such systems or districts shall file with the Commission or its delegate executed copies of Elementary-Secondary Staff Information Report EEO-5 in conformity with the directions set forth in the form and accompanying instructions. The elementary and secondary school systems and districts covered are: (1) Every one of those which have 100 or more employees, and (2) every one of those others which have 15 or more em-

ployees from whom the Commission requests the filing of reports. Every elementary or secondary school system or district shall retain at all times, for period of 3 years, a copy of the m recently filed report EEO-5 at the central office of the school system or district, or the individual school which is the subject of the report, where more convenient and shall make the same available if requested by an officer, agent, or employed of the Commission under the authority of sec. 710 of Title VII, as amended. It is the responsibility of the school systems or districts above described in this section to obtain from the Commission or its delegate necessary supplies of the

(b) For calendar year 1973, the requirements of paragraph (a) of this section shall be carried out on or before January 15, 1974.

[38 FR 26719, Sept. 25, 1973, as amended at 38 FR 32576, Nov. 27, 1973; 39 FR 30832, Aug. 26, 1974]

#### § 80.4 Assurances required.

(a) General. (1) Every application for Federal financial assistance to carry out a program to which this part applies, except a program to which paragraph (b) of this section applies, and every application for Federal financial assistance to provide a facility shall, as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part. In the case of an application for Federal financial assistance to provide real property or structures thereon, the assurance shall obligate the recipient, or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. In the case of personal property the assurance shall obligate the recipient for the period during which he retains ownership or possession of the property. In all other cases the assurance shall obligate the recipient for the period during which Federal financial assistance is extended pursuant to the application. The respon-sible Department official shall specify the form of the foregoing assurances for each program, and the extent to which like assurances will be required of subgrantees, contractors and subcontractors, transferees, successors in interest, and other participants in the program. Any such assurance shall include provisions which give the United States a right to seek its judicial enforcement.

(2) Where Federal financial assistance is provided in the form of a transfer of real property or interest therein from the Federal Government the instrument effecting or recording the transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. Where no transfer of property is involved but property is improved with Federal financial assistance, the recipient shall agree to include such a covenant to any subsequent transfer of the property. Where the property is obtained from the Fe eral Government, such covenant may also include a condition coupled with a right to be reserved by the Department to revert title to the propetry in the event of a breach of the covenant where, in the discretion of the responsible Department official, such a condition and right of reverter is appropriate to the statute under which the real property is obtained and to the nature of the grant and the grantee. In the event a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on such property for the purposes for which the property was transferred, the responsible Department official may agree, upon . request of the transferee and if necessary to accomplish such financing, and upon such conditions as he deems appropriate, to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

(b) Continuing State programs. Every application by a State or a State agency to carry out a program involving continuing Federal financial assistance to which this regulation applies (including the Federal financial assistance listed in Part 2 of Appendix A) shall as a condition to its approval and the extension of any Federal financial assistance pursuant to the application (1) contain or be accompanied by a statement that the program is (or, in the case of a new program, will be) conducted in compliance with all requirements imposed by or pursuant to this regulation, and (2) provide or be accompanied by provision for such methods of administration for the program as are found by the responsible Department official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this regulation.

(c) Elementary and secondary schools. The requirements of paragraph (a) or (b) of this section with respect to any elementary or secondary school or school system shall be deemed to be satisfied if such school or school system (1) is subject to a final order of a court of the United States for the desegregation of such school or school system, and provides an assurance that it will comple with such order, including any future modification of such order, or (2) submits a plan for the desegregation of such school or school system which the responsible Department official determines is adequate to accomplish the purposes of the Act and this part, at the earliest practicable time, and provides reasonable assurance that it will carry out such plan; in any case of continuing Federal financial assistance the responsible Department official may reserve the right to redetermine, after such period as may be specified by him, the adequacy of the plan to accomplish the purposes of the Act and the regulations in this part. In any case in which a final order of a court of the United States for the desegregation of such school or school system is entered after submission of such a plan. such plan shall be revised to conform to such final order, including any future modification of such order.

(d) Assurance from institutions. (1) In the case of any application for Federal financial assistance to an Estitution of higher education (including assistance for construction, for research, for special training project, for student loans or for any other purpose), the assurance required by this section shall eximed to admission practices and to all other practices relating to the treatment of stu-

dents.

(2) The assurance required with respect to an institution of higher education hospital or any other institution. insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students, patients, or clients of the institution or to the opportunity to participate in the provision of services or other benefits to such individuals, shall be applicable to the entire institution unless the applicant establishes, to the satisfaction of the responsible Department official, that the institution's practices in the program of the institution for which Federal financial assistance is sought, or the beneficiaries of or participants in such program. If in any such case the assistance sought is for the construction of a facility or part of a facility, the assurance shall in any event extend to the entire facility and to facilities operated in connection therewith.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1. Sec. 182: 80 Stat. 1209; 42 U.S.C. 2000d-5) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17980, 17982, July 5, 1973]

#### § 80.6 Compliance information.

(a) Cooperation and assistance. The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with

this part.

(b) Compliance reports. Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

(c) Access to sources of injurmation. Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information. Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce com-pliance with this Part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required

by law.

(d) Information to beneficiaries and participants. Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the program for which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this regulation. (Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17981, 17982, July 5, 1973]

#### § 80.7 Conduct of investigations.

(a) Periodic compliance reviews. The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this

(b) Complaints. Any person who be-lieves himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.

(c) Investigations. The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint,

or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient. the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) Resolution of matters. (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 80.8.

(2) If an investigation does not warrant action pursuant to subparagraph (1) of this paragraph the responsible Department official or his designee will so inform the recipient and the com-

plainant, if any, in writing.

(e) Intimidatory or retaliatory acts prohibited. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1) [29 FR 16298, Dec. 4, 1964, as amended at 38 FR 17981, 17982, July 5, 1973]

# § 12. Action or proceeding by unincorporated association

An action or special proceeding may be maintained, by the president or treasurer of an unincorporated association to recover any property, or upon any cause of action, for or upon which all the associates may maintain such an action or special proceeding, by reason of their interest or ownership therein, either jointly or in common. An action may likewise be maintained by such president or treasurer to recover from one or more members of such association his or their proportionate share of any moneys lawfully expended by such association for the benefit of such associates, or to enforce any lawful claim of such association against such member or members. Added L.1920, c. 915, § 6; amended L.1932, c. 609, § 2, eff. April 2, 1932.

# AFFIDAVIT OF MAILING

STATE OF NEW YORK COUNTY OF KINGS EASTERN DISTRICT OF NEW YORK LYDIA FERNANDEZ	being duly sworn,
da 41 43	
deposes and says that he is employed in the office of the United States Attorney for the Eastern	
District of New York.	
That on the 6th day of August 19 76 he served a copy of the within	
Frankle & Greenwald, Esqs.	DiTucci & DeBerardine, P.C.
80 Eighth Avenue	32 Court Street
New York, N. Y. 10011	Brooklyn, N. Y. 11201
and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, **Recount Plaza East**, Borough of Brooklyn, County	
of Kings, City of New York.	Lysea Fernande
Sworn to before me this	YDIA FERNANDEZ
6th day of August 19 76	
Sylvia E. MORRIS Notary Public, State of New York No. 24-4503861 Qualified in Kings County Commission Expires March 30, 1927	